No. 10938

IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE FRANKLIN FIRE INSURANCE CO. OF PHILADELPHIA, PENNSYLVANIA, a corporation,

Appellant,

vs.

OLUF B. HANNEY, HANS MIKELSEN and PAUL VOHL,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

C. E. H. MALOY,
Attorney for Appellees.

Office and P. O. Address:
990 Dexter Horton Building,
Seattle 4, Washington.

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STATEMENT OF THE CASE

On the former appeal of this cause, this court held the contract of insurance herein involved was obscure, uncertain and ambiguous and that an issue of fact was thereby presented as to the true intention of the parties

in the making of the builder's risk insurance policy. *Hanney v. Franklin Fire Ins. Co.,* 142 F. (2) 864, 866.

This case comes here upon the appeal of the appellant insurance company from a judgment entered upon a verdict in favor of the appellees. The appellant contends the District Court erred in refusing to grant the appellant's motion for summary judgment under Rule 56 (c) of the Federal Rules of Civil Procedure, in entering an order denying such motion and entering final judgment in favor of appellees and against appellant (Rec. 125). No error is assigned as to any ruling or proceeding during the trial before the District Court and a jury impaneled to try the case (Rec. 125, 130). It is conceded by appellant that no error was committed during the trial of the case before the court and jury. (Appellant's Brief, p. 6.)

The motion for summary judgment under Rule 56 (c) of the Federal Rules of Civil Procedure was based upon the appellees' amended complaint, the appellant's second amended answer, the depositions of Henry Stackset and Kenneth H. Wheelock, appellant's request for admissions under Rule 36 of the Federal Rules of Civil Procedure and the appellee's "statement in response to request for admissions under Rule 36" (Rec. 39-40). Rule 56 (c) of the Federal Rules of Civil Procedure provides for the granting of a motion for summary judgment when it appears from the pleadings, depositions, affidavits or admissions, etc. there is no "genuine issue as to any material fact" to be tried. The appellees' amended complaint alleged, among other things:

"In September, 1941, and to and inclusive of February 24, 1942, the plaintiffs were the owners of the halibut boat No. 20, and of tackle, apparel, furniture, fixtures and material which belonged to and was destined for the halibut boat No. 20, then being built, all of which property was covered by the provisions of the above described written policy of insurance, and all of which property was stored in locker No. 325 at the Salmon Bay Terminal of the Port of Seattle, City of Seattle, Washington; * * * and all of such personal property was stored in such locker No. 325 during all of such time for the express purpose of being attached to, used upon and in the operation of said halibut boat No. 20 and in the equipping and outfitting and building of said halibut boat No. 20." (Rec. 4, 5.)

and

"that there is due and owing to plaintiffs from defendant the sum of $14,160.14." (Rec. 5, 6.)

The appellant's second amended answer to appellees' amended complaint alleged:

"* * * (1) the defendant denies that the property listed and described by Exhibit B was covered in whole or in part by the insurance policy of which Exhibit A is a copy; (2) the defendant (in harmony with admissions made and filed in behalf of the plaintiffs herein) denies that the property listed and described by Exhibit B was in whole or in part property stored by the plaintiffs for the purpose of being attached to or used upon Halibut Boat Hull No. 20 in the building or construction thereof, or was property belonging to or destined for the building or construction of Halibut Boat Hull No. 20;" (Rec. 28.)

and

> "The defendant denies there is due or owing to plaintiffs from defendant the sum of $14,160.14 or any lesser sum." (Rec. 39.)

The depositions relied upon by appellant are the depositions of Henry Stackset, who testified in such deposition that he sold the tackle, apparel, appurtenances, furniture, fixtures and material to appellees, which was destroyed by the fire, stating the price at which sold and its condition and value, and the discovery deposition of Kenneth H. Wheelock, the agent of the appellant, who sold the builder's risk insurance policy to the appellees, wherein he testified that before delivering the policy to appellees that he read to them and explained certain provisions of the builder's risk insurance policy, but that he did not recall discussing with them the tackle, apparel and other equipment which appellees had stored in their locker at Seattle (Rec. 43-119). The appellant's request for admissions under Rule 36 in substance was as to whether the boat building agreement of May 14, 1941, between one Peterson and the appellee Hanney was genuine; that the performance by said Peterson of such contract did not require the use of tackle, apparel, appurtenances, furniture, fixtures and material which was stored in appellees' locker at Salmon Bay Terminal, Seattle; that such personal property was not incorporated in said Hull No. 20 during its construction by Peterson, and that the performance of said agreement of May 14, 1941, for the building of the Hull No. 20 did not require appellee Hanney to purchase any of such personal property for use

in the construction of such Hull No. 20 (Rec. 26-35). In response to this request for admissions, the appellees, over objection that all such requests for admissions were as to matters which were wholly irrelevant to any issue in the case, answered that the agreement of May 14, 1941 between Peterson and said Hanney appeared to be a true copy of the original agreement for the building of the Hull No. 20 and that such contract did not require the use of all of the personal property destroyed by fire and that the property destroyed by fire was not incorporated in Hull No. 20 under the construction contract of May 14, 1941; and further, that the performance of said building contract of May 14, 1941 did not require Hanney to acquire or provide for the use in the construction of such Hull No. 20 any such personal property destroyed by fire.

The foregoing is the record upon which the appellant made its motion for summary judgment and by reason of the denial thereof seeks a reversal of this cause.

The District Court held the boat building agreement of May 14, 1941 was not a part, by reference or otherwise, of the builder's risk insurance contract sued upon and that the builder's risk insurance policy herein involved was obscure and ambiguous and that it was for the jury to determine from the parol evidence admitted during the trial whether it was the intention of the appellees and appellant to cover or insure the tackle, apparel, appurtenances, furniture, fixtures and materials belonging and destined for Halibut Boat No. 20, building at Brown's Point, Tacoma.

In accordance therewith the trial proceeded, evidence was introduced by appellees and by appellant bearing upon all the circumstances surrounding the making and issuance of the builder's risk insurance policy for the purpose of determining the intention of the parties. Upon the completion of the introduction of evidence, the case was submitted to the jury under concededly correct instructions. A verdict was returned in favor of the appellees. Judgment was entered upon the verdict.

POINTS AND AUTHORITIES

1. On motion for summary judgment the moving party has the burden and all doubts will be resolved against him. A party may not be deprived of the right to a jury trial when there is a genuine issue as to any material fact.

State of Washington v. Maricopa County (9 Cir.) 143 F. (2) 871, 872.

Whitaker v. Coleman (5 Cir.) 115 F. (2) 305, 306, 307.

McElwaine v. Wickwire Spencer Steel Wire Co. (2 Cir.) 126 F. (2) 210.

Weisser v. Mursan Shoe Corp. (2 Cir.) 127 F. (2) 344, 346.

Ramsouer v. Midland Valley R. Co. (8 Cir.) 135 F. (2) 101.

Campana Corporation v. Harrison (7 Cir.) 135 F. (2) 334, 335, 336.

Walling v. Fairmont Creamery Co. (8 Cir.) 139 F. (2) 318, 322.

Snower & Co. v. U. S. (7 Cir.) 140 F. (2) 367, 369.

Consolidated Indemnity & Insurance Co. v. Alliance Casualty Co. (2 Cir.) 68 F. (2) 21, 22.

Fisher v. Sun Underwriters Co., 179 Atl. 702, 705 (R. I.).

Stulsaft v. Mercer Tube & Manufacturing Co., 43 N. E. (2) 31, 33 (N. Y.).

Prime Manufacturing Co. v. Gallun & Sons Corp., 281 N. W. 697, 699, 700, 701 (Wis.).

Walsh v. Walsh, 116 P. (2) 62, 64, 65 (Calif.).

Irving Trust Co. v. Anahma Realty Corp., 35 N. E. (2) 21-24 (N. Y.).

Suslensky v. Metropolitan Life Insurance Co., 43 N. Y. S. (2) 144, 146.

2. Where the complaint alleges facts, proof of which is necessary to enable the plaintiff to recover, which allegations are denied by the answer, a genuine issue as to material fact exists.

State of Washington v. Maricopa County (9 Cir.) 143 F. (2) 871, 872.

Snower & Co. v. U. S. (7 Cir.) 140 F. (2) 367, 369.

Campana Corporation v. Harrison (7 Cir.) 135 F. (2) 334, 336.

Weisser v. Mursan Shoe Corp. (2 Cir.) 127 F. (2) 344, 346.

Consolidated Indemnity Insurance Co. v. Allison Casualty Co. (2 Cir.) 68 F. (2) 21, 22.

3. When an insurance contract is obscure, doubtful or ambiguous, evidence of the facts and circumstances surrounding the issuance of the policy, the relation and situation of the parties, their negotiations and conversations, the subject matter of the insurance and its location, the knowledge of the parties thereof, the business in which the parties are engaged, the objects and purposes of executing the insurance contract and the practical construction given to it by the parties, are admissible to determine the intention of the parties.

Violette v. Queen Insurance Co., 96 Wash. 303, 165 Pac. 65.

Mountain Timber Co. v. Lumber Ins. Co., 99 Wash. 243, 169 Pac. 591.

Montana Stables v. Union Assur. Society, 53 Wash. 274, 101 Pac. 882.

National Bank v. Aetna Casualty Co., 161 Wash. 239, 245, 296 Pac. 831.

Queen Ins. Co. v. Meyer M. Co. (8 Cir.) 43 F. (2) 885.

Messenger v. German-American Ins. Co., 107 Pac. 643, 136 Pac. 438 (Colo.).

University City v. Home Fire Ins. Co. (8 Cir.) 114 F. (2) 288, 294, 299.

Arbuckle v. Lumbermens Mutual Casualty Co. (2 Cir.) 129 F. (2) 791-793, 794.

Dixie Pine Products Co. v. Maryland Casualty Co. (5 Cir.) 133 F. (2) 583, 584.

Eagle Star etc. Ins. Co. v. Fleischman, 2 Atl. (2) 424-427 (Md.).

Norton v. Farmers Auto Etc. Exchange, 105 P. (2) 136, 139, 142 (Calif.).

Husch Bros. v. Maryland Casualty Co., 276 S. W. 1083-1086 (Ky.).

John Sneers Faucet Co. v. Commercial Casualty Co., 99 Atl. 342, 343 (N. J.).

8 *Couch on Ins.,* 7059-7069, Secs. 2183-2187; 7069-7070, Sec. 2188.

26 *C. J.,* 77, 78, Sec. 73, 524, Sec. 736.

1 *Jones on Evidence,* Sec. 170-178, page 167.

3 *Jones on Evidence,* Sec. 453, pages 458-460.

22 *C. J.,* 1179-1183.

32 *C. J. S.,* 891, 896, 901, 911, 912.

4. Parol evidence of facts and circumstances surrounding the execution of an insurance contract, the meaning of which is obscure and ambiguous, introduced to aid its construction, present a genuine issue of a material fact.

Durand v. Heney, 33 Wash. 38, 42, 43, 73 Pac. 775.

Kieburtz v. Seattle, 84 Wash. 196, 205, 146 Pac. 400.

Gottstein v. Stusser, 178 Wash. 360, 365, 35 P. (2) 5.

State Bank of Wilbur v. Phillips, 11 Wn. (2) 483, 488, 489, 119 P. (2) 664.

Walsh v. Walsh, 116 P. (2) 62, 64, 65 (Calif.).

Stulsaft v. Mercer Tube & Mfg. Co., 43 N. E. (2) 31, 33 (N. Y.).

Irving Trust Co. v. Anahma Realty Corp., 35 N. E. (2) 21, 24 (N. Y.).

Suslensky v. Metropolitan Life Insurance Co., 43 N. Y. S. (2) 144, 146.

5. Another contract not made a part of a contract by the express terms thereof cannot be considered or made a part of such contract.

Burbank v. Pioneer Mutual Insurance Co., 60 Wash. 253, 110 Pac. 1005.

Benson v Metropolitan Insurance Co., 126 Wash. 125, 127, 217 Pac. 709.

University City v. Home Fire Insurance Co. (8 Cir.) 114 F. (2) 288, 294-299.

Glant v. Lloyd's Register of Shipping, 141 Wash. 253, 251 Pac. 274.

Laughlin v. March, 19 Wash. (2) 874, 877, 145 P. (2) 549.

Short v. Dolling, 178 Wash. 467, 35 P. (2) 82.

II *Cooley's Briefs on Insurance*, 1048 et seq.

32 *C. J.*, 1159, Sec. 269.

13 *C. J.*, 529, 766.

17 *C. J. S.*, 1237, Sec. 592.

6. Contracts of insurance are construed in the same manner as other contracts.

Isaacson Iron Works v. Ocean Accident etc. Co., 191 Wash. 221, 227, 70 P. (2) 1026.

Goodwin v. Metropolitan Life Insurance Co., 196 Wash. 391, 406-407, 83 P. (2d) 231.

7. After a case has been brought before an appellate court, none of the questions examined and determined, or which might have been examined or determined upon the first appeal, can be reheard or reviewed upon a subsequent appeal.

Fisher v. Bank of America National Trust & Savings Association (9 Cir.) 72 F. (2) 635, 638.

Long Beach Dock & Terminal Co. v. Pacific Dock & T. Co. (9 Cir.) 98 F. (2) 833, 835.

Republican Mining Co. v. Tylar Mining Co. (9 Cir.) 79 F. 733, 735. Cert. den.

Sorensen v. Pyrate Corporation (9 Cir.) 65 F. (2) 982, 985. Cert. den.

Stewart v. Salamon, 96 U. S. 361, 362, 24 L. ed. 1044.

8. Where an insurance policy does not provide for any time of payment of the loss, the insured is entitled to interest from the date of the loss.

Glover v. Rochester German Ins. Co., 11 Wash. 143, 157, 39 Pac. 380, 383.

Young v. Travelers Ins. Co., 125 Wash. 118, 124, 215 Pac. 383, 385.

Concordia Ins. Co. v. School District, 282 U. S. 545-555, 75 L. ed. 528, 542.

Queen Ins. Co. v. Dearborn S. & L. Assoc., 51 N. E. 717, 718 (Ill.).

Home Ins. Co. v. Rowe, 218 S. W. 471, 474 (Ky.).

Hartford Fire Ins. Co. v. Langford, 88 N. W. 779, 782. (Neb.).

Hartford Fire Ins. Co. v. Bernard, 221 Pac. 1061 (Okla.).

Olson v. Herman Farmers Mutual Ins. Co., 203 N. W. 743, 745 (Wis.).

7 *Couch on Ins.,* Sec. 1865, pp. 6186, 6187, 6188.

26 *C. J.,* 575, Sec. 795.

33 *C. J.,* 147, Sec. 886.

9. The amount of a loss cannot be considered unliquidated where the amount of such loss may be ascertained by a reasonably certain calculation by reference to existing market values.

17 *C. J.,* 817.

25 *C. J. S.,* pp. 539, 540, Sec. 52.

10. Where a state supreme court has not definitely ruled regarding the matter of interest, the United States Courts, when necessary to arrive at fair compensation, may exercise their discretion in awarding interest.

Concordia Ins. Co. v. School District, 282 U. S. 545-555, 75 L. ed. 528, 542.

Miller v. Robertson, 266 U. S. 243, 257-259, 69 L. ed. 265, 275, 276.

The President Madison (9 Cir.) 91 F. (2) 835, 845, 847.

11. Where an appeal has been sued out for delay under the court rule and the statute, the appellate court may award damages because of the delay.

Rule 26, Subdivision 2, Rules of the U. S. Circuit Court of Appeals for the 9th Circuit.

28 *U. S. C. A.*, Sec. 878.

Fern Gold Mining Co. v. Murphy (9 Cir.) 7 F. (2) 613, 614.

Slaker v. Connor, 278 U. S. 189, 73 L. ed. 258.

Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 233, 67 L. ed. 961, 964.

Demming v. Carlisle Packing Co., 226 U. S. 102, 57 L. ed. 140.

ARGUMENT

THE DENIAL OF THE MOTION FOR SUMMARY JUDGMENT WAS RIGHT

On Such Motion Appellant Has the Burden and All Doubts Are Resolved Against It

The assignments of error relied upon for reversal of the judgment of the District Court is the District Court's denial of the motion for a summary judgment. The question to be determined is whether the pleadings, depositions and admissions fail to disclose a "genuine issue as to any material fact." In considering such a motion the burden is upon the appellant and all doubts are resolved against it. If there be any substantial dispute as to a material fact or an issue of a material fact, the motion must be denied. The court is not authorized to try the issue but is only to determine whether there is an issue to be tried. Issue finding rather than issue determination is the pivot upon which summary judgment laws turn. A party may not be deprived of the right to a jury trial

when there is a genuine issue as to any material fact. *State of Washington v. Maricopa County* (9 Cir.) 143 F. (2) 871, 872; *Whitaker v. Coleman* (5 Cir.) 115 F. (2) 305, 306, 307; *McElwaine v. Wickwire Spencer Steel Wire Co.* (2 Cir.) 126 F. (2) 210; *Weisser v. Mursan Shoe Corp.* (2 Cir.) 127 F. (2) 344, 346; *Ramsouer v. Midland Valley R. Co.* (8 Cir.) 135 F. (2) 101; *Campana Corporation v. Harrison* (7 Cir.) 135 F. (2) 334, 335, 336; *Walling v. Fairmont Creamery Co.* (8 Cir.) 139 F. (2) 318, 322; *Snower & Co. v. U. S.* (7 Cir.) 140 F. (2) 367, 369; *Consolidated Indemnity & Insurance Co. v. Alliance Casualty Co.* (2 Cir.) 68 F. (2) 21, 22; *Fisher v. Sun Underwriters Co.,* 179 Atl. 702, 705 (R. I.); *Stulsaft v. Mercer Tube & Manufacturing Co.,* 43 N. E. (2) 31, 33 (N. Y.); *Prime Manufacturing Co. v. Gallun & Sons Corp.,* 281 N. W. 697, 699, 700, 701 (Wis.); *Walsh v. Walsh,* 116 P. (2) 62, 64, 65 (Calif.); *Irving Trust Co. v. Anahma Realty Corp.,* 35 N. E. (2) 21-24 (N. Y.); *Suslensky v. Metropolitan Life Insurance Co.,* 43 N. Y. S. (2) 144, 146.

In *Whitaker v. Coleman* (5 Cir.) 115 F. (2) 305, there were two suits involving the liability of an insurer on a policy covering the owner as the named insured and "any person while using the automobile * * * with the permission of the named insured." The first was against the owner and driver of the automobile and the second was by the insurance company for a declaratory judgment that it was not liable as insurer. In both cases the appellant demanded a jury. A motion was made by the insurance company for summary judgment, which was granted.

At 115 F. (2) 306, 307, the court said.

"Appealing in each case from the summary judgment against him, appellant is here insisting as to each that there was a genuine issue as to a material fact whether the driver was an 'insured' within the policy terms, and that he has been deprived of his right of trial by jury. We think it clear that appellant has been so deprived and that the judgments must be reversed because he has. The invoked procedure, valuable as it is for striking through sham claims and defenses which stand in the way of a direct approach to the truth of a case, was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial.

Judges in giving its flexible provisions effect must do so with this essential limitation constantly in mind. To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force. Testing appellant's offer or proof by this rule, it plainly appears that an issue on which he is entitled to a jury trial has been summarily determined against him.

* * * We think that this will not at all do. Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by

jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."

In *Ramsouer v. Midland Valley R. Co.* (8 Cir.) 135 F. (2) 101, the court at pages 105, 106, said:

"We have not reviewed all the evidence bearing upon the particular features stressed by the respective parties, and there is more or less conflict in the testimony, but the issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion as in a motion for a directed verdict, the court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits."

The Pleadings Presented Genuine Issues as to Material Facts

The above quoted pleadings clearly establish there was an issue as to a material fact. Appellees' amended complaint, among other things, alleged:

"were the owners of tackle, apparel, furniture, fixtures and material (the property described in Exhibit B) which belonged to and was destined for the halibut boat No. 20, then being built, all of which

property was covered by the provisions of the policy." (Rec. 5.)

which was Exhibit A to appellees' amended complaint, and the complaint further alleged:

"that there is due and owing to plaintiffs from defendant the sum of $14,160.14." (Rec. 5, 6.)

These allegations were a proper method of pleading. Rule 8 (a)-(e), (l), (f) Federal Rules of Civil Procedure. Appendix of Forms to such Rule 1-12. No attack was made by appellant upon this method of pleading.

The second amended answer of appellant denied these allegations as follows:

"the defendant denies that the property listed and described by Exhibit B was covered in whole or in part by the insurance policy of which Exhibit A is a copy." (Rec. 38.)

and

"denies there is due or owing the plaintiffs from defendant the sum of $14,160.14, or any lesser sum." (Rec. 39.)

This whole controversy depends on whether the property destroyed by fire was insured by the builder's risk insurance policy. The appellees alleged that it was insured and intended to be insured. The appellant denied that the property destroyed was insured or intended to be insured. This presented a genuine issue as to a material fact. It presented *the* material issue to be determined from the evidence.

Under similar circumstances this court reversed the District Court, which granted a summary judgment in

the case of *State of Washington v. Maricopa County* (9 Cir.) 143 F. (2) 871, 872. It was there said at page 872:

> "The pleadings were (1) appellant's amended complaint hereinafter called the complaint, and (2) appellee's amended answer thereto, hereafter called the answer. There were no admissions except those in the answer. The answer admitted some allegations of the complaint, denied others and contained allegations which were deemed denied. Some, at least, of the issues thus raised were genuine issues as to material fact.
>
> Thus, instead of showing that there was no genuine issue as to any material fact, the pleadings showed that there was such issue."

In *Snower & Co. v. U. S.* (7 Cir.) 140 F. (2) 367, 369, it was said:

> "Here the complaint alleged that the plaintiff had borne the burden of the taxes in question. This allegation was specifically denied by defendant's answer. Thus there was an issue of fact. That this fact was material cannot be denied inasmuch as the statute—Section 902 of the Revenue Act of 1936, 49 Stat. 1747, 7 U. S. C. A., Section 644—makes it a condition precedent to a refund that the claimant establish that he bore the burden of the tax. Because there was such an issue of fact presented by the pleadings the motion for summary judgment should have been denied."

In *Campana Corporation v. Harrison* (7 Cir.) 135 F. (2) 334, 336, the court said:

> "In the case at bar, the Corporation alleged in its complaint that it bore the burden of the tax and

that its dealings with the Sales Company were at arm's length. The Commissioner in his answer denied these allegations. This presented sharp, clear issues of fact. * * * The affidavits did not demonstrate that there were no issues of fact; they demonstrated that there were decided issues of fact. The Commissioner could not be foreclosed on the right to a trial on those issues by the entry of summary judgment."

See also *Weisser v. Mursan Shoe Corp.* (2 Cir.) 127 F. (2) 344, 346. *Consolidated Indemnity Insurance Co. v. Alliance Casualty Co.* (2 Cir.) 68 F. (2) 21, 22.

The Boat Building Contract Is No Part of the Builder's Risk Insurance Policy. The Builder's Risk Insurance Policy Is Ambiguous, Which Raises Genuine Issues of Material Fact

But appellant's contention is that the builder's risk insurance policy and the boat building contract are one contract and should be interpreted to the effect that it was the intention of the appellant and appellees that the property destroyed by fire, located at Seattle, was not covered or insured.

The builder's risk insurance policy here involved was dated August 20, 1941, over three months after the making of the boat building contract of May 14, 1941. Appellees were the insured. Appellant was the insurer. The builder's risk insurance policy does not refer to the boat building contract between Peterson and Hanney, dated May 14, 1941, in any manner. It does not by reference

or by express terms make the boat building contract a part of the insurance contract (Rec. 10-20). Obviously there was no agreement or meeting of the minds that the boat building contract should be a part of the builder's risk policy without any such reference or a provision in the insurance contract in express terms making such boat building contract a part of it. The appellant insurance company was not a party to the boat building contract. It was, of course, a physical and legal impossibility for the boat building contract of May 14, 1941 to have made by reference or otherwise the builder's risk insurance policy a part of such contract. The contract of insurance was not negotiated or made until August 20, 1941, and its terms could not be known by any of the parties. Moreover, the boat building contract does not attempt in any manner to make the insurance contract a part of it by reference or by express terms. If it had ever been contended that the appellant was a party to the boat building contract, it would be the first one to repudiate such claim. The only provision contained in such contract with reference to the builder's risk insurance is that Peterson, the first party, would procure the builder's risk insurance, the premium to be paid by Hanney, the second party (Rec. 33).

Inasmuch as the builder's risk insurance contract did not by reference or by express terms make the boat building contract a part of it, the boat building contract is not a part of the insurance contract. *Burbank v. Pioneer Mutual Insurance Co.*, 60 Wash. 253, 110 Pac. 1005; *Benson v. Metropolitan Insurance Co.*, 126 Wash. 125,

127, 217 Pac. 709; *University City v. Home Fire Insurance Co.* (8 Cir.) 114 F. (2) 288, 294-299; *II Cooley's Briefs on Insurance,* 1048 et seq.; 32 *C. J.,* 1159, Sec. 269.

In *Burbank v. Pioneer Mutual Insurance Co.,* 60 Wash. 253, 110 Pac. 1005, an action was commenced against the insurance company to recover a loss sustained by fire. The insurance company pleaded that certain printed matter upon the back of the contract of insurance required the insured to make proofs of loss within sixty days after the fire and furnish other information, and that the making of such proofs of loss was a condition precedent to the right to recover; and further, that no such proofs of loss had been made by the insured. The insurance company offered such printed conditions on the back of the policy in evidence and the trial court rejected the offer. There was involved the question of waiver of proofs or loss, which was decided in favor of the insured. In passing upon the question of whether the printed matter upon the back of the policy was a part of the insurance policy, the Supreme Court of Washington at 60 Wash. 256, 257, 110 Pac. 1006, said:

> "The policy was executed upon a printed form prepared by appellant, the terms of which must be liberally construed in favor of the assured. Conditions and stipulations endorsed upon the back of a policy, when sufficiently mentioned in the body of the instrument, will become a part of the contract of insurance itself, with the same force and effect as though they had been recited therin; but if no sufficient reference is made on the face of the policy to such endorsed conditions and stipulations, they can-

not be regarded as a part of the contract, but must be ignored when the policy is being construed to ascertain obligations devolving upon the assured.

"An endorsement on the back of a policy may be regarded as part of the contract, provided it is referred to in the policy as constituting part of it. If, however, there be no reference whatever to it in the policy, nothing to show that the parties meant it to be a part of the contract, it will be regarded merely as the act of the insurer, and not, therefore, binding on the insured. *Stone v. United States Casualty Co.,* 34 N. J. Law, 371; *Kingley v. New Eng. Mut. Fire Ins. Co.,* 8 Cushing 393; *Ferrer v. Home Mut. Ins. Co.,* 47 Vt. 416; *Farmers' Ins. & L. Co. v. Snyder,* 16 Wend. 48; *Bize v. Fletcher, Doug.* 291, note.' *Planters' Mut. Ins. Co. v. Rowland,* 66 Md. 236, 240, 7 Atl. 257."

The above authorities hold that other papers, documents, contracts, printed conditions or stipulations form no part of the contract of insurance except where

"It is referred to in the face of the policy or there is something to show that the parties intended it to be a part of the contract. 32 *C. J.,* 1159, Sec. 269.

Contracts of insurance are to be construed in the same manner as other contracts. *Isaacson Iron Works v. Ocean Accident etc. Co.,* 191 Wash. 221, 227, 70 P. (2) 1026; *Goodwin v. Metropolitan Life Insurance Co.,* 196 Wash. 391, 406-407, 83 P. (2) 231. The Supreme Court of Washington has many times held that another document, paper or statement not referred to or made a part of a contract by the express terms thereof, cannot be con-

sidered or made a part of the contract. *Glant v. Lloyd's Register of Shipping,* 141 Wash. 253, 251 Pac. 274; *Laughlin v. March,* 19 Wash. (2) 874, 877, 145 P. (2) 549; *Short v. Dolling,* 178 Wash. 467, 35 Pac. (2) 82; 13 *C. J.,* 529, 766; 17 *C. J. S.,* 1237, Sec. 592.

in *Laughlin v. March,* 19 Wash. (2) 874, 877, 145 P. (2) 549, it was said:

> "The sheet of paper containing the description of the property is not referred to in the declaration; consequently, the certainty of the declaration is not enhanced by it. *Glant v. Lloyd's Register of Shipping,* 141 Wash. 253, 251 Pac. 274, 252 Pac. 943. In that case, it was said, p. 262:
>
> 'We consider it determined in this state that statements on other parts of the writings, not in terms made a part of the writing itself, are not terms of the contract'."

It is contended that the making of the boat building contract of May 14, 1941 and the making of the builder's risk insurance contract dated August 20, 1941, were a part of the same transaction; this is obviously fallacious. It is far-fetched to say a contract made May 14, 1941 between the boat builder and one of the appellees, to which appellant was not a party, prior to the time that the other appellees had become interested with such appellee, prior to the time that the appellees had negotiated for or purchased the personal property destroyed by fire, prior to the time that they had ever discussed the terms and conditions of the insurance contract with the agent of the appellant, is a part of the insurance contract when

there is not any express reference or provision in the insurance contract that such boat building contract should be considered and made a part of the insurance contract. There is no evidence in the record to prove that the making of the boat building contract and the builder's risk insurance policy were part of the same transaction.

The appellant says "that both contracts were elements or parts of a single transaction" (Appellant's Brief, p. 17), and that the boat building contract and the builder's risk insurance policy were "two interdependent documents" (Appellant's Brief, p. 18). No reference is made to any part of the record to substantiate such statements. No authority is offered to sustain the statements.

Appellant makes several references to the fact that "Hull No. 20" is mentioned in the boat building contract of May 14, 1941 and in the builder's risk policy, and argues that by reason thereof it was *as a matter of law* the intention of the parties to insure only the boat and materials to be used in her construction. Appellant fortifies this claim by referring to appellees' response to appellant's request for admissions, wherein appellees state the boat building contract did not require them to purchase the "tackle, apparel * * * appurtenances, etc. * * * and other furniture and fixtures, and all material" for the construction of the boat, and that such personal property was not used in the construction of the boat. Obviously it was not used in the construction of the boat because it was destroyed by fire. While the builder's risk policy did mention "Hull No. 20," that was not the only property described, for it also insured, in addition to the

hull, the tackle, apparel * * * appurtenances, etc. * * * and other furniture and fixtures and all material belonging and destined for halibut boat hull No. 20." It will be noted that the appellant used the term "halibut boat hull No. 20" in the builder's risk form No. 50 Amended, which further designated the boat as a fishing vessel. In order to render the "halibut boat hull No. 20" fit and usable as a fishing vessel it was necessary to acquire equipment and gear, other than materials used in the construction of "hull No. 20." This the appellees did. Such apparel, tackle, etc. "belonged and was destined for halibut boat hull No. 20." An examination of the list of such gear and equipment (Rec. 23-25) readily discloses that none of such gear or equipment was intended to be used in the construction of the hull. It has never been contended by the appellees that webbing, cables, cork, purse blocks, etc. were materials to be used in the construction of the hull. Such property might very accurately come within the description of "tackle, apparel, furniture, fixtures or appurtenances." It always has been contended by appellees that such described personal property "belonged and was destined for halibut boat hull No. 20" and that it was the intention of the parties to insure such personal property under the above language. This is part of the language this court held on the former appeal to be obscure and ambiguous. Appellant has at all times known all the foregoing before, during and since the former appeal. Nothing said by appellant has rendered the insurance contract clear, certain and unambiguous. The language of the insurance contract has not changed.

There is nothing in the boat building contract which changes its language. The injection of the boat building contract into the case has not clarified the insurance contract. It would seem that appellant has endeavored to create further obscurity and ambiguity rather than clarification.

The contention of appellant here is to all purposes and effect the same contention made upon the former appeal. The principal contention of the appellant upon such appeal was that property located at Seattle was not intended to be insured, *as a matter of law,* for the reason that the policy only covered materials located at Tacoma which were to be used in the construction of the hull.

In the brief of appellee upon the former appeal, No. 10647, appellant, then appellee, said:

> "Appellee claims that to review the language of the same two clauses upon which appellants rely, and to analyze their language in the light of context, is to reach the conclusion that those clauses themselves plainly and clearly disclose a purpose to limit the property insured to materials assembled in or intended for the vessel against risks in, of and about the facilities used for the construction thereof at the time and place of the work."

The appellant here is again arguing that the contract of insurance, heretofore held by this court to be obscure and ambiguous, is not ambiguous. Appellant now contends, *as a matter of law,* the policy clearly shows that the property destroyed by fire was not insured under the terms of the policy; that is exactly what the appel-

lant argued on the former appeal. If the appellant has used different language, in any event the same contention was made; and if such contention was not made, it could have been made because appellant knew then as well as now that none of the property destroyed by fire was ever contemplated to be used by the appellees in the construction of the hull. Indicating very clearly that it is again appellant's contention that the policy, plus the boat building contract, which as a matter of law cannot be considered a part of the insurance contract, does not create any ambiguity or uncertainty and that therefore the property destroyed by fire was not insured or covered by the policy, it argues at page 20-22 of its brief, that because the total building price was $30,000.00 and the total insurance $30,000.00, therefore there was no intention to also include and insure the personal property destroyed by fire located at Seattle, which appellees valued at $14,160.14. There are several answers to this contention. The insurance was $15,000.00 on August 20, 1941, when only the keel was laid. Therefore the insureds had ample protection. The builder had ample protection because during the course of the building he was paid in installments and at or about the time of the fire had been paid some $19,500.00. The hull and materials for same were located at Tacoma and the gear and equipment was located at Seattle. Appellees may have felt it was very improbable a fire would take place in two places on the same day and unless there was a fire on the same day at both places, causing a total loss, they were amply protected. The appellees were not required to fully insure

themselves. In addition the property was not worth $14,160.14, for the jury found it was worth $7200.00 at the time of the fire. As to the gear and equipment not being insured after delivery of the vessel, there was nothing to prevent the appellant from extending the insurance, or it was covered by the hull insurance policy issued by Hansen & Rowland Inc. The argument of appellant has not made the builder's risk insurance policy any less obscure or ambiguous.

The boat building contract of May 14, 1941 was introduced in evidence as Defendant's Exhibit A-1 and all the foregoing argument contained on pages 20-23 of appellant's brief were made to the jury. The District Court permitted the jury to consider the boat building contract and the builder's risk insurance policy along with the other evidence. The jury determined all of appellant's foregoing contentions adversely to appellant.

This court on the former appeal of this case, 142 F. (2) 864, held that the builder's risk insurance policy was "obscure," which is tantamount to saying that it was indefiinte, uncertain and ambiguous. At 142 F. (2) 866 it was said:

> "For our part we think the language of the contract, as applied to the situation disclosed in the pleading, leaves the subject in considerable obscurity. * * * The phrase in part descriptive of the property covered, namely, 'all material belonging and destined for' the boat, may in appropriate circumstances be broadly applied without doing violence to other descriptive matter. The word 'destine' or 'destined' conveys the idea of predetermination. As defined by

> Webster, it means, among other things, to appoint, to design, to set apart or designate. * * * The true intent of the engagement may perhaps be clarified by the showing made in the course of a trial, by facts and circumstances then in evidence, the practical construction, if any, given the contract by the parties, or by proof of custom and usage in the locality. * * * The motion should have been denied, with leave to answer, and the parties given opportunity to make their respective showings."

The foregoing language of the opinion clearly indicates that the plaintiffs and the defendants were to be given an opportunity to present parol evidence to establish the intention of appellees and appellant, or as the court said, "the true intent of the engagement."

Such respective showings were of course the evidence of the facts and circumstances surrounding the issuance of the builder's risk insurance policy, which involved a showing or evidence as to the relation and situation of the parties, their negotiations and conversations, the subject matter of the insurance and its location, the knowledge of the appellant thereof, the business in which the appellees and appellant were engaged at the time, the object and purpose of appellees and appellant in executing and delivering the insurance policy and the practical construction given the contract by the parties, all for the purpose of determining the intention of the parties at the time of the making of the builder's risk insurance policy, and the intention of the parties as to whether or not the property destroyed by fire was covered by the terms of such builder's risk insurance policy.

Such evidence as above described is always admissible to determine the true intent of the parties to an ambiguous contract. *Violette v. Queen Insurance Co.,* 96 Wash. 303, 165 Pac. 65; *Mountain Timber Co. v. Lumber Ins. Co.,* 99 Wash. 243, 169 Pac. 591; *Montana Stables v. Union Assur. Society,* 53 Wash. 274, 101 Pac. 882; *National Bank v. Aetna Casualty Co.,* 161 Wash. 239, 245, 296 Pac. 831; *Queen Ins. Co. v. Meyer M. Co.* (8 Cir.) 43 F. (2) 885; *Messenger v. German-American Ins. Co.,* 107 Pac. 643, 136 Pac. 438 (Colo.); *University City v. Home Fire Ins. Co.* (8 Cir.) 114 F. (2) 288, 294, 299; *Arbuckle v. Lumbermen's Mutual Casualty Co.* (2 Cir.) 129 F. (2) 791-793, 794; *Dixie Pine Products Co. v. Maryland Casualty Co.* (5 Cir.) 133 F. (2) 583, 584; *Eagle Star etc. Inc. Co. v. Fleischman,* 2 Atl. (2) 424-427 (Md.); *Norton v. Farmers Auto etc. Exchange,* 105 P. (2) 136, 139, 142 (Calif.); *Husch Bros. v. Maryland Casualty Co.,* 276 S. W. 1083-1086 (Ky.); *John Sneers Faucet Co. v. Commercial Casualty Co.,* 99 Atl. 342, 343 (N. J.); 8 *Couch on Ins.,* 7059-7069, Secs. 2183-2187; 7069-7070, Sec. 2188; 26 *C. J.,* 77, 78, Sec. 73, 524, Sec. 736; 1 *Jones on Evidence,* Sec. 170-178, 167; 3 *Jones on Evidence,* Sec. 453, pages 458-460; 22 *C. J.,* 1179-1183; 32 *C. J. S.,* 891, 896, 901, 911, 912.

Such facts and circumstances surrounding the transaction, as above described, raise material issues of fact. There are bound to be conflicts in the evidence as to the facts and circumstances surrounding the issuance of the builder's risk policy, regarding the relation and situation of the parties, pertaining to their negotiations and con-

versations, the knowledge of each of them, the business in which they each are engaged, the object and purpose of executing the insurance policy and the practical construction given the contract by the parties. Different inferences may be drawn from such evidence. Reasonable minds might reach different conclusions. All these matters raise genuine issues as to a material fact. *Durand v. Heney,* 33 Wash. 38, 42, 43, 73 Pac. 775; *Kieburtz v. Seattle,* 84 Wash. 196, 205, 146 Pac. 400; *Gottstein v. Stusser,* 178 Wash. 360, 365, 35 P. (2) 5; *State Bank of Wilbur v. Phillips,* 11 Wash. (2) 483, 488, 489, 119 P. (2) 664; *Walsh v. Walsh,* 116 P. (2) 62, 64, 65 (Calif.); *Stulsaft v. Mercer Tube & Mfg. Co.,* 43 N. E. (2) 31, 33 (N. Y.); *Irving Trust Co. v. Anahma Realty Corp.,* 35 N. E. (2) 21, 24 (N. Y.); *Suslensky v. Metropolitan Life Insurance Co.,* 43 N. Y. S. 144, 146.

The case of *Durand v. Heney,* 33 Wash. 38, 73 Pac. 775, is in point. There was there involved an ambiguous written contract. At 33 Wash. 41, 73 Pac. 776, 777, the court said:

> "We think it may also be conceded that there are certain well defined exceptions to this rule—as, where the identity of the subject-matter of a document, or its construction, depends upon collateral facts or extrinsic circumstances, the inferences from such facts, when they are proven, should be drawn by the jury. Where it is an enforcible contract, and the ambiguity arises as to the relative responsibilities and duties of the respective parties under the contract, which responsibilities and duties can be determined either by proof of the meaning of the terms

used in the contract or by a showing of the circumstances surrounding the parties with reference to the subject-matter of the contract at the time it was entered into, and there is any controversy over such facts, undoubtedly such contract should be submitted to the jury, and its meaning determined by that tribunal by aid of such explanatory testimony."

In *Kieburtz v. Seattle,* 84 Wash. 196, 146 Pac. 400, the Supreme Court of Washington at 84 Wash. 205, 146 Pac. 404, said:

> "On the other hand, if the contract be of doubtful interpretation, the question was properly submitted to the jury, and their verdict is conclusive against a recovery if there was a substantial conflict in the evidence, and the question was submitted under proper instructions. As to the evidence, we think there was a substantial conflict. True, the conflict was between the experts. But the question was one on which it was proper to take the opinions of experts; and, clearly, where such evidence is properly submitted to a jury, it is as much their province to determine between the conflicting opinions as it is their province to determine between other forms of disputed evidence, and their verdict upon the one is as conclusive as it is upon the other."

These cases were followed in *State Bank of Wilbur v. Phillips,* 11 Wash. (2) 483, 119 P. (2) 664, where the court held that the agreement there involved was ambiguous and quoted from the case of *Durand v. Heney* (supra). At 11 Wash. (2) 490, 119 P. (2) 667, the court said:

"We hold, therefore, that the contract or agreement was ambiguous, that the court properly allowed the introduction of oral testimony to explain its meaning, and that the jury was justified in finding, from all the facts and the surrounding circumstances, that the amount specified in the order was not to be paid to appellant until such time as respondents' house was completed by W. K. Deal."

In *Walsh v. Walsh,* 116 P. (2) 62, the Supreme Court of California had before it an appeal from a judgment of dismissal based upon the granting of defendant's motion for a summary judgment. The litigation involved the interpretation of a property settlement agreement and a subsequent agreement made between the parties. The plaintiff contended for an interpretation of the meaning of the words "child or children" as used in the contract, and the defendant contended for a different interpretation of such words. The California statute providing for the entry of a summary judgment is very similar to Section 56 (c) of the Federal Rules of Civil Procedure. At page 64 the court said:

"Thus, in passing upon a motion for summary judgment, the primary duty of the trial court is to decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed further, but must allow such issue to be tried by a jury unless a jury trial is waived."

In passing on the merits, the court at page 65 said:

"We are of the opinion from a reading of paragraph VIII that the words 'child or children' as there used are ambiguous and indefinite. The words, flex-

ible in character, are of varying meanings, sometimes defined as synonymous with minor, at other times employed to denote relationship with regard to parentage irrespective of age. On its face the phraseology of this paragraph considered in its entirety is reasonably consistent with either of the interpretations advanced here by the litigants. When a contract is in any of its terms or provisions ambiguous or uncertain, 'it is primarily the duty of the trial court to construe it *after a full opportunity afforded all the parties in the case to produce evidence of the facts, circumstances, and conditions surrounding its execution and the conduct of the parties relative thereto.' Barlow v. Frink,* 171 Cal. 165, 173, 152 P. 290, 292. (Italics added.) The governing principle as to when parol testimony may be introduced to explain the language of a contract or to ascertain the intention of the parties is clearly set forth in *Kenney v. Los Feliz Investment Co., Ltd.,* 121 Cal. App. 378, 386, 387, 9 P. 2d 225, 229, as follows: 'It is a settled rule that, when the language employed is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import, an ambiguity arises where extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties, and that for this purpose conversations between and the declarations of the parties during the negotiations at and before the execution of the contract may be shown. *Balfour v. Fresno C. & I. Co.,* 109 Cal. 221, 41 P. 876.' And in *Scott v. Sun-Maid Raisin Growers Ass'n,* 13 Cal. App. 2d 353, at page 359, 57 P. 2d 148, at page 151 the court stated: 'When the meaning of the language of a contract is uncertain or doubtful and parol

evidence is introduced in aid of its interpretation, *the question of its meaning is one of fact* * * *. *Thomson v. Leak,* 135 Cal. App. 544, 548, 27 P. (2) 795; *Gallatin v. Markowitz,* 139 Cal. App. 10, 13, 33 P. (2) 424; *Coats v. General Motors Corp.,* 3 Cal. App. (2) 340, 356, 39 P. (2) 838'. (Italics added.)

Applying the rules of law above stated, it is clear that the trial court should have denied defendant's motion for a summary judgment so that the issue raised between the parties hereto as to the duration of defendant's undertaking to furnish support and maintenance to the plaintiff might be tried upon its merits. The summary judgment statute is drastic and its purpose is not to provide a substitute for existing methods in the trial of issues of fact. The use made of the statute in this case was a perversion and an abuse of it."

Stulsaft v. Mercer Tube & Mfg. Co., 43 N. E. (2) 31 (N. Y.), is another case wherein in order to determine whether or not an employment agreement met the requirements of the statute of frauds and where it was held that parol evidence was admissible in connection therewith, a summary judgment had been entered in favor of the defendant, from which the plaintiff appealed. In reversing the judgment granting defendant's summary judgment, it was said at page 33:

"Here the writing does not expressly state that the plaintiff's existing employment is continued upon the same terms or upon customary terms. It is, however, fairly open to the construction that the words 'you can now consider yourself the exclusive sales agent for Florida and New England territories, for

the next ten years' was intended as a description of an agreement complete in all its terms, leaving nothing open for future discussion or agreement even though there may have been no previous oral discussion or express agreement upon such terms. Parol evidence of the relations of the parties and of custom might not only support such construction of the writing, but might identify the terms and conditions which would fit the description of 'exclusive sales agent' of the defendant corporation. 'To give heed to these things is not to ignore the rule that the writing must contain all the material terms of the agreement. It is to explain the memorandum without changing or enlarging it.' *Marks v. Cowdin,* supra, 226 N. Y., page 145, 123 N. E., page 141. The construction and sufficiency in law of the memorandum must in this case await trial at which proof of the existing relations of the parties and other circumstances known to both parties may clarify the meaning of the letter and identify the terms of the employment."

In *Irving Trust Co. v. Anahma Realty Corp.,* 35 N. E. (2) 21 (N. Y.), the Court of Appeals of New York again reversed an order of the lower court granting summary judgment. The case involved the interpretation of an agreement granting certain easements of light and air and imposing certain restrictions. There had been a reorganization of the mortgagor and a foreclosure of a mortgage involving the appointment of a receiver, together with the making of another agreement between the successor parties and the defendant. The question of the con-

struction of the provisions of the agreement became necessary. At pages 24 and 25 the court said:

> "Construction must follow in the light of the intention, position and changed position of the parties after a full disclosure of all the facts and circumstances which may have a bearing thereon. * * * Determination of the issues in the present action depends, in part at least, upon events which occurred subsequent to the commencement of the prior action (281 N. Y. 798, 24 N. E. 2d 480) and upon facts pleaded extrinsic of the written contract. Different questions of fact are tendered for decision. * * * Upon various issues presented by the pleadings in the present action we make no decision since we are convinced that the record does not present a case for summary judgment in whole or in part and that all the issues properly raised by the pleadings should be presented to a trial court."

The foregoing cases indicate what this court had in mind when it decided this case on the former appeal. In accordance therewith a trial was had before a jury, whereat the appellees and appellant were given an opportunity "to make their respective showings."

Appellant May Not Again Litigate Questions Which Were or Might Have Been Litigated on the Former Appeal

The motion for summary judgment upon the grounds made, did not raise any new question that was not decided or could have been decided by this court upon the former appeal. True it is that the motion for summary

judgment is also based upon two depositions, one of the witness Henry Stackset, whose deposition was read during the trial, which contained only evidence as to his having sold the property destroyed by fire to the appellees, its condition and value (Rec. 45-89), and the deposition of Kenneth H. Wheelock, the authorized agent of the appellant, who sold the builder's risk insurance policy to the appellees, in which deposition he admitted reading and explaining to the appellees certain clauses of the builder's risk insurance policy (Rec. 89-119). All of which are wholly immaterial to the question here involved. (Appellant's Brief, p. 11.)

The appeal of the appellant only raises the same question that was considered upon the former appeal. The appellant again contends that according to its interpretation of the builder's risk insurance policy, plus the boat building contract, which we have established cannot be considered in interpreting such insurance contract, it was the intention of the parties that the property destroyed by fire was not covered by the builder's risk insurance policy. That is the same contention appellant made in this court upon the former appeal. The decision of this court upon that appeal became the law of the case and the question now raised is frivolous and moot. This, in effect, is but an appeal by the appellant from a decision of this court to this court.

It is settled law that after a case has been brought before this court and decided, that none of the questions examined and determined upon the first appeal can be reheard or reviewed upon a subsequent appeal. The only

question attempted to be now reviewed on this appeal is whether the decision of this court on the former appeal was right or wrong. *Fisher v. Bank of America National Trust & Savings Association* (9 Cir.) 72 F. (2) 635, 638; *Long Beach Dock & Terminal Co. v. Pacific Dock & T. Co.* (9 Cir.) 98 F. (2) 833, 835; *Republican Mining Co. v. Tylar Mining Co.* (9 Cir.) 79 F. 733, 735, cert. den.; *Sorensen v. Pyrate Corporation* (9 Cir.) 65 F. (2) 982, 985, cert. den.; *Stewart v. Salamon*, 96 U. S. 361, 362, 24 L. ed. 1044.

A very similar situation to that presented on this appeal existed in the case of *Fisher v. Bank of America* (9 Cir.) 72 F. (2) 635. This court held the District Court had correctly interpreted the Circuit Court of Appeal's decision and mandate on the first appeal. The court then quoted at 72 F. (2) 638 from *Roberts v. Cooper*, 20 How. (61 U. S.) 467, 481, 15 L. ed. 969, as follows:

> " 'But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on

petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members'."

Another case squarely in point on this question is that of *Long Beach Dock & Terminal Co. v. Pacific Dock & T. Co.* (9 Cir.) 98 F. (2) 833. In speaking of the assignment of error upon this appeal, this court said at 98 F. (2) 835:

"Thus, in substance and effect, each assignment is that the trial court erred, in that it obeyed, and refused to violate, the mandate of this court."

The appellee moved to dismiss the appeal upon the following grounds:

" 'The appeal in effect assigns as error on the part of the trial court only its action in obeying the mandate of the Circuit Court of Appeals on the prior appeal'."

In granting such motion this court, at 98 F. (2) 835, said:

"The motion is well founded. The sole question attempted to be raised on this appeal is whether our decision on the former appeal was right or wrong. Appellant contends that it was wrong, and that, therefore, our mandate was wrong and should not have been obeyed. That the mandate was obeyed, and that the decree was in conformity therewith, is conceded. Thus the decree was, in effect, our decree, and the present appeal is 'from ourselves to ourselves'."

It is clear that appellant's motion for summary judgment and its appeal from the denial thereof raises again in this court only the question of the interpretation of the builder's risk insurance policy. That has already been interpreted by this court upon the first appeal. It was there held that the contract of insurance was ambiguous or obscure. The questions raised on the first appeal cannot now be relitigated on this appeal. The appellant has presented nothing new for the consideration of this court upon this appeal.

The Evidence Upon the Trial Proves There Were Genuine Issues of Material Facts

The record establishes there were genuine issues as to material facts. The testimony of the appellees, Mikelsen, Hanney and Vohl and the testimony of Wheelock, appellant's agent who sold the builder's risk insurance policy, establish such issues. Appellee Mikelsen testified that on August 20, 1941, they bought gear which was located at Fisherman's Dock in Ballard and he and Hanney asked Wheelock if the stuff stored in the locker was covered. Wheelock said, "Yes, it covers everything." Asked whether different clauses and conditions of the policy were discussed with Wheelock upon that occasion, he stated that they were and that Wheelock read to them the following clauses of the policy:

> * * * on hull, tackle, apparel, ordnance, munitions, artillery, engines, boilers, machinery, appurtenances, etc. (including plans, patterns, molds, etc.) boats and other furniture and fixtures and all material be-

longing and destined for—halibut boat hull No. 20 building at—Brown's Point, Tacoma, Washington, as per clauses hereinbelow specified."

"This Insurance is also to cover all risks, including fire, while under construction and/or fitting out, including materials in Buildings, Workshops, yards and docks of the assured, or on quays, pontoons, craft, etc., and all risk while in transit to and from the works and/or the vessel wherever she may be lying, also all risks of loss or damage through collapse of supports or ways from any cause whatever, and all risks of launching and breakage of the ways."

Wheelock said: This policy cover you with everything." (Sup. Rec., 161-163). He further testified that they told Wheelock the fishing equipment and gear was at the Salmon Bay Terminal in locker 325 and that they had purchased it from Henry Stackset and that they wanted it covered, and that Wheelock then said, "Yes, it is covered." (Sup. Rec. 165-166.) Mikelsen further testified that after the fire he went to Wheelock and said, "Well, how about the money. We got some money coming now from the insurance," and Wheelock said, "Oh yes, but you know the insurance company is always slow paying but I will do the best I can to get it for you." (Sup. Rec. 181.)

Appellee Hanney testified they started to build the boat in August and that he and Mikelsen went to Wheelock's office and told him that the boat was being built, talked about builder's risk insurance and about supplies and property they had at other places, and that Wheelock said, "Well, whatever you buy is insured, whether you

have it in Tacoma or Seattle or any place else it would be insurance." And that they then said, "All right"; that they told Wheelock they were buying Stackset's equipment and fishing gear; that Wheelock had a form of the policy which was later written up, they not having received the insurance policy for three or four weeks after its being written, and he read portions of the policy to them, saying, "Here it is, your stuff is covered right here," and that Wheelock read the two clauses above set forth, which Mikelsen testified were read to them, and stated that those clauses covered them (Sup. Rec. 198-202).

The appellee Vohl testified that he talked with Wheelock, appellant's agent, asked him to renew the policy and asked him whether the stuff they had stored at Fisherman's Dock was covered and that Wheelock said, "Yes it was." (Sup. Rec. 304.)

Wheelock, appellant's agent, when asked whether he had any such conversations with Mr. Hanney, Mr. Mikelsen or Mr. Vohl regarding the purchase of insurance of equipment stored in locker 325, Salmon Bay Terminal, testified: "No, I have no recollection of any such conversations at any time with reference to the things that I have heard here in the last two days," and that no such conversation pertaining to any of that material was had (Sup. Rec. 333). He denied having had any conversation with Mikelsen after the fire relating to collecting the insurance money (Sup. Rec. 334). On cross-examination he admitted having read to the appellees, first, the second clause above mentioned, and second, another clause fur-

ther down in the policy pertaining to trial trips and with considerable reluctance and equivocation finally admitted he read and explained to the appellees the first clause mentioned in the testimony of appellees Mikelsen and Hanney regarding "tackle, apparel * * * appurtenances, etc. * * * and other furniture and fixtures and all material belonging and destined for halibut boat hull No. 20." He admitted that it would have been the natural thing for him to have read such clause to them first (Sup. Rec. 342).

The foregoing testimony shows there was a conflict in the evidence concerning the negotiations, conversations and surrounding circumstances involving the purchasing and issuing of the builder's risk insurance policy. Such evidence was a part of "the respective showings" of the appellant and appellees and "facts and circumstances."

Regarding the "practical construction, if any, given the contract by the parties," there were two very cogent and convincing items of evidence consisting of appellees' Exhibits 4 and 5. When the appellees could not collect on the builder's risk insurance policy and placed the hull insurance with Hansen & Rowland Inc. at Tacoma, the appellees authorized Hansen & Rowland Inc. to endeavor to collect the insurance money from the appellant. In attempting to do so, Hansen & Rowland Inc. wrote a letter under date of June 8, 1942, to the appellant in connection with the fire loss, and among other things stated:

> "The policy recites under Clauses for Builder's Risks, 'including materials In Buildings, Workshops,

yards and docks of the assured, or on quays, pontoons, craft, etc.' It is the assured's contention the material was located in building under rental to him, and the property lost was intended for the vessel under construction and covered by the policy." (Sup. Rec. 289.)

In response to this letter and on June 18, 1942, the appellant wrote Hansen & Rowland Inc., in answer to its letter to the appellant under date of June 8, 1942, saying among other things:

> "You quote a clause under 'Clauses for Builder's Risks' of the policy, particularly the words 'including materials in buildings, workshops, yards and docks of the assured . . .' You then state this language covers material not in a building of which a portion is rented to the assured.
>
> "It is our position that your interpretation of this policy in effect deletes from the clause the words 'of the assured.' If these words mean anything they mean what they say; namely, the buildings, workshops and yards of which the assured has complete dominion. The policy was clearly never intended to cover material placed in lockers in any building regardless of type of hazard.
>
> "We trust that Mr. Hanney will understand why his loss does not constitute a proper claim under our policy, as the materials which he lost were not in buildings, workshops, yards or docks or on quays, pontoons, craft or other similar property owned by him." (Sup. Rec. 294, 295.)

It will be observed the appellant, at the time of writing such letter, took the position that there was no liability

because the appellees did not own the building in which the destroyed personal property was located at the time of the fire. There is not one word in the letter to the effect that liability is denied upon the ground that the "tackle, apparel, * * * appurtenances, etc. * * * furniture and fixtures, and all materials belonging and destined for—halibut boat hull No. 20" was not covered under such language or because it was not personal property "belonging and destined for" the vessel. It is apparent the appellant placed an entirely different interpretation upon the builder's risk insurance policy on June 18, 1942, than it did after suit was commenced. The foregoing portion of this letter was an implied admission of liability. It placed the denial of liability upon an entirely untenable ground. These letters were read to the jury and were for the jury's consideration in determining the intention of the parties.

THE ALLOWANCE OF INTEREST WAS RIGHT

The builder's risk insurance policy does not provide for any time for the payment of the loss. Therefore the appellees are entitled to interest from the date of the fire. This is the law and is sustained by a long line of cases. *Glover v. Rochester Berman Ins. Co.,* 11 Wash. 143, 157, 39 Pac. 380, 383; *Young v. Travelers Ins. Co.,* 125 Wash. 118, 124, 215 Pac. 383, 385; *Concordia Ins. Co. v. School District,* 282 U. S. 545-555, 75 L. ed. 528, 542; *Queen Ins. Co. v. Dearborn S. & L. Assoc.,* 51 N. E. 717, 718 (Ill.); *Home Ins. Co. v. Rowe,* 218 S W. 471, 474 (Ky.); *Hartford Fire Ins. Co. v. Langford,* 88 N. W. 779, 782

(Neb.); *Hartford Fire Ins. Co. v. Bernard,* 221 Pac. 1061 (Okla.); *Olson v. Herman Farmers Mutual Ins. Co.,* 203 N. W. 743, 745 (Wis.); 7 *Couch on Ins.,* Sec. 1865, pp. 6186, 6187, 6188; 26 *C. J.,* 575, Sec. 796; 33 *C. J.,* 147, Sec. 886.

In *Glover v. Rochester German Ins. Co.,* 11 Wash. 143, 157, 39 Pac. 380, the fire took place on January 9, 1893. The policy had a provision for arbitration and a provision providing for payment sixty days after proofs of loss were submitted. An arbitration was had which was set aside and the clause for the payment sixty days after proofs of loss was waived. At 11 Wash. 157, 39 Pac. 383, the Supreme Court of Washington said:

> "The last contention is as to the date from which interest should be allowed. The plaintiff in his complaint prayed for interest from March 29, and the court allowed interest therefrom. The policies provided, in case of a difference of opinion between the insurer and the insured as to the amount of the loss, for payment sixty days after proofs of loss were submitted. But this clause was for the benefit of the insurer, and by agreeing to arbitrate, it was waived, and there was no error in allowing interest from the time it was prayed for."

It would appear from this decision that had the plaintiff prayed for interest from the date of the loss that it would have been allowed. In all probability interest was not prayed for from the date of the loss because of the sixty-day clause.

In *Young v. Travelers Ins. Co.,* 125 Wash. 118, 124,

125, 215 Pac. 383, the trial court allowed interest from September 8, 1919, the date upon which the insurance company advised the plaintiff that it had issued no insurance policy to J. R. Young. At 125 Wash. 125, 215 Pac. 385, the court said:

> "The appellant insurance company assigns error on this ruling, contending that interest should be allowed only from a much later date. The plaintiff's appeal is based on the contention that interest should be allowed from the date of the issuance of the policy. But we find no error in the conclusion of the court. By the terms of the policy, no action would lie thereon until sixty days after the proofs of death reached the office of the insurance company, and interest would not commence to run until the right of action accrued. There was, therefore, a day of grace, and, from the record, we cannot say that the court did not correctly determine it."

In *Queen Insurance Co. v. Dearborn S. & L. Assoc.,* 51 N. E. 717, 718 (Ill.), it was said:

> "Unless the contract as to the mortgagee entitled the company to 60 days or some other time in which to pay, the amount was due immediately upon the loss, and as we have construed that contract interest allowed from that date was proper."

The rule is stated in 26 *C. J.,* 575-576, Sec. 795, as follows:

> "As a rule interest on the amount to which plaintiff is entitled should be allowed from the time when the loss is due and payable. Interest may be allowed from the date of the loss where there is no provision

in the policy extending or otherwise fixing the time for payment, or where, although there is such a provision, it has been waived by the insurer."

In 33 *C. J.*, 147, Sec. 886, it is stated:

"Interest may be allowed from the date of the loss or injury where the policy or contract is not definite as to the time when the insurance is to be paid, or where, although there is a provision fixing the time of payment, such provision has been waived by the company."

Appellant presents no authority to sustain its contention that interest from the date of the fire should not have been allowed appellees. It is probably appellant's claim the amount was unliquidated. However, it is the rule that when the amount is "subject to reasonably certain calculation by reference to existing market values," it cannot be considered unliquidated. 17 *C. J.*, 817; 25 *C. J. S.*, 539, 540, Sec. 52. Appellee's witness Ben Smith testified that on February 24, 1942 fishing gear and equipment of the type described in plaintiff's Exhibit 2 (the inventory of the property purchased from Stackset) had a market value (Sup. Rec. 322). Therefore, under the foregoing rule appellees are in any event entitled to interest from the date of the fire.

Should this court determine the Supreme Court of Washington has not decided the point here involved, it is the law in the United States courts that interest may be allowed even in cases of unliquidated damages when it is necessary to arrive at fair compensation for the withholding of money. *Concordia Ins. Co. v. School District,* 282

U. S. 545-555, 75 L. ed. 528, 542; *Miller v. Robertson,* 266 U. S. 243, 257-259, 69 L. ed. 265, 275, 276. See also The President Madison (9 Cir.) 91 F. (2) 835, 845, 847.

The rule is stated in *Concordia Ins. Co. v. School District,* 282 U. S. 545, 554, 555, 76 L. ed. 528, 543, as follows:

> "In the absence of an authoritative state decision to the contrary, there was nothing in either which required the trial court in rendering its judgment to depart from the rule in respect of the allowance of interest which this court had recognized, namely, that, even in a case of unliquidated damages, 'when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages'."

The District Court was right in allowing interest from the date of the fire for the reasons before set forth. The appellant has been wrongfully withholding the money due the appellees upon the builder's risk insurance policy since the date of the fire. The appellant has deprived the appellees of the use of such money and itself has had the use of such money. Justly and equitably "interest or its equivalent" should be allowed appellees.

THE APPEAL IS FRIVOLOUS. DAMAGES FOR THE DELAY SHOULD BE AWARDED APPELLEES

The appeal is without merit. It is so insubstantial as to be frivolous. Appellant's brief amounts to nothing more than recital of the steps in this litigation, plus the opin-

ion of appellant as to the legal effect of the same. No authority on any question is cited. While the opinion of the authors of appellant's brief may be interesting to someone, it is not one bit interesting to appellees. While this appeal has been pending, appellees are losing the use of their money. Because of this appeal they have been compelled to incur additional expenses in attorney's fees and costs of printing their brief, which are not taxable. Nothing that this court has not already passed upon has been presented for consideration. Perhaps it is appellant's purpose to make the collection of appellees' judgment as costly as possible so that their net recovery will be substantially reduced. It may be believed such strategy is wise; but whatever the purpose of appellant, it is clear that the appeal was sued out for delay. Appellees invoke Rule 26, Subdivision 2 of the rules of this court and 28 U. S. C. A., Sec. 878 and pray for and submit that damages at the rate of ten per cent, in addition to interest, should be awarded appellees upon the amount of the judgment. *Fern Gold Mining Co. v. Murphy* (9 Cir.) 7 F. (2) 613, 614; *Slaker v. Connor,* 278 U. S. 189, 73 L. ed. 258; *Wagner Electric Mfg. Co. v. Lyndon,* 262 U. S. 226, 233, 67 L. ed. 961, 964; *Demming v. Carlisle Packing Co.,* 226 U. S. 102, 57 L. ed. 140.

CONCLUSION

It was held on the former appeal the builder's risk insurance policy was obscure and ambiguous. The boat building contract is not a part of the insurance policy and

cannot be considered with it on the motion for summary judgment. The former decision of this court made the law of the case. It was controlling on the hearing on a motion for summary judgment and the District Court obeyed the mandate of this court in denying such motion. The appellant again contends the builder's risk insurance policy is not ambiguous and that it must be construed as providing no insurance or coverage for the property destroyed. There is nothing new in this contention and appellant is again asking this court to review its own decision. If the boat building contract could be considered as a part of the builder's risk insurance policy, it does not render the insurance contract any the less ambiguous. The pleadings presented a genuine issue as to a material fact. No authority has been presented by appellant to sustain its position, unless such authority be the opinions of the authors of appellant's opening brief. Were it not for the fact appellant had assigned error on the question of interest, appellees would have been compelled to move for a dismissal of this appeal on the ground that it was frivolous and moot. Interest was properly allowed by the District Court and appellant has not proved any reason why it should be disallowed. The judgment of the District Court was right and this case should be affirmed and the appellees awarded damages.

Respectfully submitted,

C. E. H. MALOY,

Attorney for Appellees